

**Consideration of objections with respect to Findings of Fact and  
Conclusions of Law with Nonfinal Order in the matter of G. W.  
Sedgwick and Fahlsing v. DNR; Administrative Cause No. 15-020W**

- **Finding of Fact and Conclusions of Law with Nonfinal Order (issued on October 8, 2015)**
- **Correspondence filed by Claimant, G. W. Sedgwick, on October 21, 2015, which is being characterized as the Claimants' objections to the "Findings of Fact and Conclusions of Law with Nonfinal order"**

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>G. W. SEDGWICK</b>	)	<b>Administrative Cause</b>
<b>and ROZELLA FAHLSING,</b>	)	<b>Number: 15-020W</b>
<b>Claimants,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>DEPARTMENT OF NATURAL RESOURCES,</b>	)	<b>(PL-22564)</b>
<b>Respondent.</b>	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
WITH NONFINAL ORDER**

Case Summary and Procedural Background:

1. On January 12, 2015, Claimant, G.W. Sedgwick ("*Sedgwick*"), filed correspondence with the Natural Resources Commission ("*Commission*") pertaining to the Department of Natural Resources' ("*Department*"), denial of an application identified as PL-22564 submitted by himself, as the agent of the applicant, Rozella Fahlsing ("*Fahlsing*"). Sedgwick and Fahlsing are hereinafter referred to collectively as "the Claimants".
2. Sedgwick's correspondence indicates that the permit application sought to construct 140 feet of concrete seawall on the shoreline of Fahlsing's property and states the Claimants' opinion that "the above property should qualify for a concrete seawall, replacing a bulkhead timber wall, without placing glacial stone lakeward of [the] concrete wall." The correspondence specifies that the property in question is the property owned by Fahlsing located in Topeka Indiana and fronting on Emma Lake.
3. Emma Lake is a public freshwater lake as defined at Indiana Code § 14-26-2-3. *Also see Information Bulletin #61 (Fourth Amendment) "Listing of Public Freshwater Lakes", October 1, 2014, <http://www.in.gov/legislative/iac/20140924-IR-312140381NRA.xml.pdf>.*
4. The Department is the administrative agency authorized to exert regulatory control over Indiana's public freshwater lakes for the protection of the public's vested right to the natural resource and the natural scenic beauty. *Indiana Code 14-26-2-5*. Included in the Department's responsibilities is the administration of a permitting program associated with

activities occurring within public freshwater lakes, including, as relevant here, the construction, modification, repair or replacement of a seawall. *Indiana Code § 14-26-2-23(a)(1)*.

5. Notice of scheduling a prehearing conference was served upon the Claimants and the Department and a prehearing conference was conducted on March 19, 2015. Two additional status conferences were conducted and an administrative hearing was scheduled for and conducted on September 22, 2015.
6. The Commission is possessed of jurisdiction of the parties and the subject matter of this proceeding.
7. The Commission is the ultimate authority with respect to this proceeding. *312 IAC 3-1-2, Indiana Code § 4-21.5-1-15*.

Findings of Fact:

8. Fahlsing is the owner of real property situated in Topeka, Indiana located in LaGrange County. The property enjoys a total of 216 feet of shoreline on Emma Lake. *Respondent's Exhibit A*.
9. Since at least as early as 1981, a seawall has existed on the property.
10. On June 3, 1981, the Department issued a permit to Fahlsing's late husband, Ernest Fahlsing, to "construct a railroad tie and stone seawall...with its lakeward face along the legally established shore line, joined to existing railroad tie and stone seawall on adjacent property to the north and located on the approximate 100 foot frontage of the property..." *Claimants' Exhibit 2*.
11. On June 22, 1990, the Department issued a second permit authorizing the construction of "a railroad tie seawall...joined to an authorized railroad tie seawall (PL-13,699) on adjacent property to the north and an existing railroad tie seawall on the applicant's property to the south and located on approximately 10 feet of the frontage..." *Claimant's Exhibit 3*.
12. Fahlsing commissioned Sedgwick in 2014 to obtain the necessary permits to construct a new concrete seawall across 143 feet of her 216 feet of total frontage. The Claimants' permit application was submitted on July 11, 2014. *Respondent's Exhibit B*.
13. On September 3, 2014, the Department issued to the Claimants an "Incomplete Application Notice" (*IAN-1*) advising the Claimants that Department staff had identified the project site

to occur "within a shoreline category that is considered an 'Area of Special Concern'. According to lake rules (312 IAC 11-4-2), seawalls in such an area may only be constructed of glacial stone or bio engineered material, or both." *Respondent's Exhibit B*. The Department added the advisory that the Claimants might also choose to reface the existing seawall with glacial stone or bioengineered materials without need for a permit as long as the refacing was completed in accordance with specifications stated in the IAN-1. *Testimony of James Hebenstreit*.

14. On November 13, 2014, in response to the Department's IAN-1, the Claimants provided a description of the proposed project as follows:

We propose removing 143' and replacing it with a concrete wall with foundation in lake bed. Our remaining 73' we plan to leave unimproved. After pouring the 143' we would place glacial stone on 1/2 of wall just above water for wildlife. This is normal in Michigan. Plenty of room for wildlife and not putting financial burden on property owner. Full glacial stone for 143' cost estimated at \$5,000.00 2-seawalls one stone and 1 cement. A concrete retaining wall wouldn't work on this property. Existing wood wall was permitted and we want to replace it with concrete. Old wall is in poor condition and dangerous.

*Claimants' Exhibit 5*.

15. On November 17, 2015, the Department issued to the Claimants a second "Incomplete Application Notice" ("IAN-2") providing the Claimants the same information as was provided with its IAN-1 and adding the following additional requirement:

Please provide plans that show the following:

1. The lakeward face of the proposed glacial stone seawall will be located at the legal shoreline; for your reference the established legal lake level for Emma Lake is 880.87' NGVD.
2. In order to ensure stability, the proposed glacial stone seawall needs to maintain a 3:1 slope.
3. Show the distance from the legal shoreline landward to the lakeward face of the proposed concrete retaining wall/walkway.
4. The lowest point of the concrete retaining wall/walkway, including the excavated sub-base should be above the legal lake level.

*Testimony of James Hebenstreit, Respondent's Exhibit C.*<sup>1</sup>

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<sup>1</sup> The requirement stated in Respondent's Exhibit C to provide additional information pertaining to a retaining wall appears inconsistent with the Claimants' statement that a retaining wall would not be appropriate for this property. There is no evidence in the record that clarifies this apparent inconsistency.

16. With respect to both IAN-1 and IAN-2, the Claimants were advised that a failure to respond within 30 days of the date of the notice would result in a recommendation to deny the permit application. *Testimony of James Hebenstreit, Respondent's Exhibits B & C.*
17. On December 29, 2014, the Department issued its "Denial Notice" citing the following reasons:

1. Failure to provide a complete application and the information necessary to adequately review the project as requested in the Incomplete Application Notices dated September 3, 2014 and November 17, 2014, copy enclosed.
2. The site is located in an Area of Special Concern as defined in 312 IAC 11-2-2; pursuant to 312 IAC 11-4-2(c) if a new seawall is to be placed in an Area of Special Concern, the seawall must be comprised of either glacial stone or bioengineered materials.
3. Pursuant to IC 14-26-2, the Department of Natural Resources is responsible for regulating most construction activities within Indiana's public freshwater lakes; as such, the Department is charged with preserving and protecting the waters of the lakes for the use of Indiana's citizens and holds the waters of the lakes in trust for use by the public; placing glacial stone lakeward of the legal shoreline constitutes fill in the lake; placement of fill in this area removes it from public use.

*Testimony of James Hebenstreit, Respondent's Exhibit A.*

18. Nathan Thomas ("Thomas") is a lakes permitting biologist for the Department's Division of Fish and Wildlife and has been so employed for over five years. A portion of Thomas responsibilities is to conduct site assessments to ascertain the impact of a proposed project, for which a permit application has been made, upon fish, wildlife and botanical resources. Thomas visited the site associated with the permit application and determined the site to be an Area of Special Concern due to the existence of 1050 square feet of Spatterdock located on the southern portion of the Fahlsing property. *Testimony of Nathan Thomas.*
19. The Claimants offered no evidence contrary to Nathan Thomas' ("Thomas") determinations as to the existence or proliferation of emergent vegetation on Fahlsing's property south of the site proposed for construction of the seawall. However, the Claimants' clarified that the proposed concrete seawall would be constructed on the northern portion of Fahlsing's property and the emergent vegetation Thomas referred to will not be disturbed by the project. *Testimony of Kathleen Fahlsing and James Hebenstreit.*
20. The Claimants' expressed in their correspondence by which they commenced this proceeding that the existing, permitted timber seawall qualifies as a "bulkhead seawall" and that the

construction of a concrete seawall, without the need for glacial stone, should be approved.

*Claimants' Exhibit 4.*

21. The Claimants presented a document purporting to be the report of Thomas J. Green, PE, CPSEC ("*Green Report*") as evidence at the administrative hearing despite the fact that the Claimants failed to call Thomas J. Green as a witness. The report attempts to provide the information necessary to establish the seawall existing on Fahlsing's property as a bulkhead seawall in accordance with 312 IAC 11-2-5. *Claimants' Exhibit 1.* Claimants' Exhibit 1 was admitted over the objection of the Department with qualification. The administrative law judge explained to the Claimants the weight she would afford the content of the report was significantly diminished by the fact that its creator was not present to testify in elaboration of the document's content or to be subjected to cross-examination by the Department. Under this circumstance, the administrative law judge is hampered in her ability to scrutinize Mr. Green's qualifications or the content of the report and therefore any conflicts in the evidence associated with the report will be resolved in favor of the Department.
22. James Hebenstreit ("*Hebenstreit*") has served as an Assistant Director for the Department's Division of Water for the past 25 years of his 42 year tenure with the Department. In his present role, Hebenstreit is responsible for the final review of permit applications and is authorized by the Department Director to issue approvals and denials of those applications under the administration of the Division of Water. *Testimony of Hebenstreit.*
23. Photographs of the timber seawall currently existing at the site reveal that the metal posts required for holding the timbers are leaning towards the lake. The timbers in some photographs display significant cracking and in some instances there appears evidence of rot. Furthermore, certain photographs exhibit voids and gaps in the timber seawall. *Respondent's Exhibit D.*
24. Hebenstreit concluded that the seawall appears to be deteriorated in such a manner that it is not presently functioning as a bulkhead seawall. *Testimony of Hebenstreit.* This was also the conclusion reached by Division of Water staff<sup>2</sup> who conducted the on-site investigation. *Id.*
25. The Green Report refers to at least five photographs that were not attached to report as it was offered and admitted as Claimants' Exhibit 1. The report offers that there are "no large gaps or sink holes behind the wall." *Id.* First, it is recognized that what constitutes "large" is

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<sup>2</sup> Hebenstreit stated that Joel Sanderson and possibly one additional staff person conducted the site inspection.

purely subjective and Green was not available to offer any additional detail to support his opinion. Possibly more important is the reasonable inference that apparently sinkholes and gaps of sizes less than what Green characterized as "large" do exist behind the existing wall.

26. The Green Report expressed that there is "little evidence of depressions or gaps that would indicate wave action or lake water had eroded behind the wall." *Claimant's Exhibit 1*.

Again, the administrative law judge must infer from the fact that there is "little evidence of depressions or gaps..." that there is *some* evidence of depressions and gaps and what constitutes "little evidence" is again a subjective quantification that was not subject to further clarification.

27. The Green Report is not consistent with Sedgwick's statement that the "old wall is in poor condition and dangerous." *Claimants' Exhibit 5*.

#### Conclusions of Law:

28. An "Area of Special Concern" is defined at 312 IAC 11-2-2 as:

An area that contains at least one (1) of the following characteristics:

- (1) An altered shoreline where bulkhead seawalls are at least two hundred fifty (250) feet apart.
- (2) Bogs, fens, muck flats, sand flats, or marl beaches identified by the division of nature preserves in the Natural Community Classification System.
- (3) More than six hundred twenty-five (625) square feet of contiguous emergent vegetation or rooted vegetation with floating leaves.

29. The IAN-1, IAN-2 and the Denial Notice issued by the Department to the Claimants indicates only the Department's conclusion that the area proposed for construction of the concrete seawall is an Area of Special Concern. The notices do not indicate whether that conclusion was reached by the Department because of the existence of 1050 square feet of emergent vegetation, as would be addressed by 312 IAC 11-2-2(3), or because the proposed seawall would occur along a section of shoreline where no other bulkhead seawall exists within 250 feet, as would be covered by 312 IAC 11-2-2(1), or both.

30. The Department concluded correctly that within an Area of Special Concern, 312 IAC 11-4-2(c) requires a new seawall to be comprised of bioengineered materials or glacial stone or both.

31. The matter remaining for determination is whether the concrete seawall proposed by Permit PL-22564 occurs in an area consisting of over 625 square feet of contiguous emergent vegetation or in an area where no bulkhead seawall exists within 250 feet.
32. "The burden of persuasion and the burden of going forward are sometimes collectively referred to as the burden of proof. A person seeking the benefit of a license has the burden of proof for entitlement to the license." *Majewski v. DNR*, 12 CADDNAR 299 (2011), citing *Indiana DNR v. United Refuse Co.*, 615 N.E.2d 100 (Ind. 1993) and *Ind. DNR and NRC v. Krantz Bros. Const.*, 581 N.E.2d 935 (Ind. App. 1991).
33. A "bulkhead seawall is defined at 312 IAC 11-2-5, as follows:
- Sec. 5. (a) "Bulkhead seawall" means a vertical, or near vertical, solid concrete, steel sheet piling, or vinyl piling structure, which has the purpose of shoreline protection.
- (b) A timber wall may be deemed to be a bulkhead wall if the property owner proves to the satisfaction of the division of water that the wall functions as a bulkhead wall by providing evidence in the form of a written assessment from a registered professional engineer, licensed professional geologist, or soil scientist with expertise in shoreline protection or wave dynamics. The written assessment must address and evaluate each of the following items:
- (1) The structural integrity of the wall.
- (2) The height of the top of the wall above normal lake level.
- (3) Success of the wall in protecting the shoreline from erosion in the past.
- (4) The ability of the wall to retain land or prevent land from sliding as evidenced by the lack of sinkholes or depressions behind the wall.
- (5) Adequacy of existing connections to adjacent shore protection structures or tiebacks at each end of the wall.
- (6) The timber wall was constructed before January 1, 1991.
34. The record fails to identify the existence of any seawall within 250 feet of the site proposed for Fahlsing's concrete seawall, except the timber seawall presently existing on Fahlsing's property.
35. The evidence presented by the Claimants in support of their contention that the timber seawall in existence on Fahlsing's property is serving as a bulkhead seawall is not convincing. The Green Report, alone, without support in the form of testimony and/or the referenced photographs lacks sufficient detail to support the conclusions stated.
36. The photographic evidence presented by the Department reasonably supports the Department's conclusion that the timber seawall existing on Fahlsing's property is deteriorated to such a degree that it is incapable of serving as a bulkhead seawall. This




conclusion is actually further supported by the reasonable inferences that may be drawn from the Green Report.

37. The evidence fails to establish the existence of a bulkhead seawall within 250 feet of the site proposed by the Claimants for constructing the concrete seawall.
38. It is concluded that the project occurs within an Area of Special Concern.
39. Because the proposed site for constructing the concrete seawall is determined to be an Area of Special Concern due to the lack of existence of a bulkhead seawall within 250 feet, it is not necessary to consider whether the site is also an area where over 625 square feet of emergent vegetation occurs when the project site, although under common ownership, is actually located adjacent to the area containing the emergent vegetation and will not damage the vegetation.

Nonfinal Order:

40. The Department's denial of the Claimants' permit application, Identified as PL-22564, is affirmed.

Dated: October 8, 2015

  
Sandra L. Jensen  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, Indiana 46204-2200  
(317) 232-4229

A copy of the foregoing was sent to the following. A copy of any pleading or document filed with the Commission must also be served on these persons:

G.W. Sedgwick Seawall  
Eva David  
780 Ln. 150 H -- Hamilton Lake  
Hamilton, Indiana 46742

Rozella Fahlsing  
2440 600 West Emma Lake  
Topeka, Indiana 46571

Ihor Boyko  
Office of Legal Counsel  
Department of Natural Resources  
Indiana Government Center South  
402 West Washington Street, Room W295  
Indianapolis, Indiana 46204

cc: DNR, Division of Water: Lori Schnaith  
DNR, Division of Fish and Wildlife: Linnea Petercheff

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G. W. SEDGWICK SEAWALL CONSTRUCTION

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Cause #-15-0200

DNR# - PL-22564

Sandra Jensen

Administrative Law Judge

10-21-2015

**FILED**

OCT 21 2015

NATURAL RESOURCES COMMISSION  
DIVISION OF HEARINGS

Ms. Jensen,

① Our feelings on this project are the two previous approved permits for this property prove this is a wooden bulkhead seawall. (with DNR construction instructions)

② Mr. Thomas permitting biologist looked at whole project and not the 143' which is mostly intact, and he wants to call most applications area of special concern.

③ Mr. Hebenstreit ruled on this project without visiting the site, nor did the DNR attorney.

④ What Mr. Sedgwick referred to as dangerous was that some of the top ties have been lifted off by flood waters.

⑤ We were not aware that our Engineer Mr. Green needed to be present to defend his report.

⑥ Conclusion: The claimants feel that no one should rule against us without visiting the site.

Sincerely,

